

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK BYARS,

Defendant-Appellee.

UNPUBLISHED
May 18, 2001

No. 229180
Wayne Circuit Court
LC No. 99-011757

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK BYARS,

Defendant-Appellee.

No. 229181
Wayne Circuit Court
LC No. 99-011756

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellant,

v

MARK BYARS,

Defendant-Appellee.

No. 229182
Wayne Circuit Court
LC No. 99-011755

Before: McDonald, P.J., and Smolenski and K. F. Kelly, JJ.

PER CURIAM.

In these consolidated cases, the prosecutor appeals as of right from an order dismissing the charge of delivering between 50 and 225 grams of cocaine, MCL 333.7401(2)(a)(iii); MSA

14.15(7401)(2)(a)(iii), and two orders dismissing charges of delivering less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv); MSA 14.15(7401)(2)(a)(iv). We decide these appeals without oral argument pursuant to MCR 7.214(E). We reverse and remand.

The trial court issued an order compelling the Detroit police department to provide certain discovery materials to defendant for use in preparation for an entrapment hearing. The court adjourned the hearing once because the materials were not provided until a few days before the hearing was scheduled to occur. On the day the hearing was rescheduled, the police department delivered additional material to defense counsel. The trial court refused to grant a second adjournment and dismissed the cases with prejudice. We review the trial court's ruling for an abuse of discretion. *People v Davie (After Remand)*, 225 Mich App 592, 597-598; 571 NW2d 229 (1997).

A trial court has discretion to fashion an appropriate remedy for noncompliance with a discovery order. *People v Loy-Rafuls*, 198 Mich App 594, 597; 500 NW2d 480 (1993), rev'd in part on other grounds 442 Mich 915 (1993). "[I]n fashioning remedies in the exercise of that discretion, there must be a fair balancing of the interests of the courts, the public, and the parties." *People v Taylor*, 159 Mich App 468, 487; 406 NW2d 859 (1987). Further, the court's exercise of discretion "requires inquiry into all the pertinent circumstances, i.e., the causes and bona fides of tardy, or total, noncompliance, and a showing by the objecting party of actual prejudice." *Id.* at 482. The court should "consider a criminal defendant's interests in the optimal preparation of his own case and the ability to minimize prosecutorial opportunities to falsify evidence." *People v Clark*, 164 Mich App 224, 229; 416 NW2d 390 (1987). "A remedy which would put the objecting party in a better position than he would have enjoyed had disclosure been timely made would seem of dubious value, particularly if it does violence to other legitimate interests in the case." *Taylor, supra* at 487. Thus, exclusion of otherwise admissible evidence should be limited to the most egregious violations where other remedies, such as a continuance, would not protect the competing interests. *Id.*; *Clark, supra* at 230.

From the record before us, it appears that the police department had no valid excuse for failing to comply with the discovery order in a timely manner. However, it provided many documents about a month after the officer in charge received the order. At that time, defense counsel stated that while he had not reviewed those documents in detail, they appeared to include everything he needed to investigate his entrapment claim. The court properly adjourned the hearing to allow defense counsel to complete his investigation. There was no showing that the late arrival of these discovery documents prejudiced defendant, who was out on bond, except insofar as his attorney had not reviewed them and thus did not know if they assisted his case in any way. Moreover, those documents related primarily to the buyer's conduct with respect to other persons arrested for narcotics violations at defendant's place of employment, so it is unclear what relevance they had in determining whether defendant was entrapped.

Defense counsel requested a second adjournment so that he could review the newly supplied documents. It does not appear from the record that the late compliance prejudiced defendant in any way. The more severe remedy of a dismissal is not appropriate where a continuance would have alleviated any harm to defendant's case by allowing his counsel to prepare for trial. *People v Elston*, 462 Mich 751, 764; 614 NW2d 595 (2000). The lower court

rejected that option, speculating that the same problem would recur. The prosecutor, who was not himself at fault, admitted that if it happened a second time, he would consent to dismissal. In light of all the circumstances, we conclude that the court abused its discretion in dismissing the cases with prejudice.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction.

/s/ Gary R. McDonald
/s/ Michael R. Smolenski
/s/ Kirsten Frank Kelly